
Advertising on Trial - Truthful responsibility at the heart of advertising

***Seied Beniamin Hosseini**

BA,L.L.B, PG Student in MBA, B.N. Bahadur Institute of Management Sciences (BIMS), University of Mysore.

****Dr. D.Anand**

MBA, Ph.D., Professor, B.N. Bahadur Institute of Management Sciences (BIMS), University of Mysore.

*****Shima Azizi**

BAL,LLM,Research scholar in Law, Department of Studies in Law, University of Mysore.

“Living in an age of advertisement, we are perpetually disillusioned. The perfect life is spread before us every day, but it changes and withers at a touch”

“J. B. Priestley”

Abstract

False advertising is any published claim that is deceptive or untruthful. Misleading advertising is any published claim that gives a consumer an incorrect understanding of product they are interested in purchasing or using. The false and misleading advertising by companies of any product may result in customer suffering a financial loss, or another form of damage to the consumer.

In the present research work the researcher will consider the unnoticed aspect of trademark law which in some instances may constitute a license to cheat. It shows that under certain circumstances a seller can use its own trademark to mislead its customers, free from legal sanction, in contexts where the same behaviour would be sanctioned if the seller used other advertising media. Furthermore the researcher will prove that an alternate conception of the economic function of trademarks can be used to understand the informational value of trademarks and their advertising function after identifying circumstances appropriate for legal intervention. Moreover, this article will conclude that the 2015 Consumer Protection Bill's proposal as a new interpretation of the false advertising provision which had mentioned earlier in old Consumer Protection Law of 1986, is not sufficient to eliminate this disparity.

Keywords: Misleading advertisement, OECD, Trademark, Act, MRTP, , Consumer , COPRA, C.PC, Cr.PC., U.T.P, FSSAI, ASCI,

Introduction

Though advertising has a positive contribution to make, one needs to

recognize that advertising has immense manipulative power and capacity to harm the consumer and the public interest, Unscrupulous and excessive advertising not only leads to increased distribution costs,

resulting in increased selling price, but also tends to tempt the buyer to buy what he does not necessarily need. Vance Packard, one of the most vehement critics of advertising, has rightly pointed out the manipulative and misleading effects of advertising: Large-scale efforts are being made, often with an impressive success, to channel the buyer's thought processes and purchasing decision by the use of insights gleaned from psychometric and social sciences, with the result that many of us are being influenced and manipulated far more than we realize, in the patterns of our everyday lives.¹ The objective of regulating misleading advertising is to ensure that advertisements do not distort the facts about the product and mislead the buyer through subtle implications, omissions, and false statements about the quality, quantity, features or other characteristics of the product or any service accompanying the product like repair and maintenance.

Misleading advertisement

Misleading advertisement broadly refers to any fraudulent, deceptive or dishonest trade practice; or business misrepresentation of the products or services that are being sold; which is prohibited by a statute or has been recognised as actionable under law by a judgement of the court. However, the term does not have a universal standard

definition. Misrepresentations can be about any characteristic of a goods or service, real or imagined. Consequently laws prohibiting unfair trade practices often include a general provision and more specific provisions addressing some of the more common types of misrepresentations.² Misleading advertisement encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming off, dilution and disparagement.³ It can arise in any line of business and also frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement.

At the international level, the World Bank and the Organisation for Economic Cooperation and Development (OECD) Model Law list the following trade practices to be unfair⁴ :

- Distribution of false or misleading information that is capable of harming the business interests of another firm.
- Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of

¹ Packard, Vance (1957). *The Hidden Persuaders*, New York: Pocket Books, pi.

² Buick, Carl, "Dealing with Unfair Trade Practices", Addis Ababa, May 2008, source: http://www.circ.in/pdf/CPS-06-Unfair_Trade_Practices.pdf, accessed on April 16, 2016

³Pham, Alice (2007), "Competition Law in Vietnam: A Toolkit", CUTS HRC, Hanoi, source:

http://www.cutsinternational.org/HRC/pdf/Vietnam_Toolkit.pdf, accessed on April 15, 2016

⁴ World Bank & OECD, (1999), "A Framework for the Design and Implementation of Competition Law and Policy", Washington D.C., <http://www.oecd.org/daf/competition/liberalisationandcompetitioninterventioninregulatedsectors/afameworkforthedesignandimplementationofcompetitionlawandpolicy.htm>, accessed on April 14, 2016

production, properties, and suitability for use, or quality of good.

- False or misleading comparison of goods in the process of advertising.
- Fraudulent use of another's trade mark, firm name, or product labelling or packaging.
- Unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information. Article 10bis of the Paris Convention prohibits the following components of unfair competition:

All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor; and indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.⁵

Concept of Trademark

The concept of Trademark is not new in India. It was in vogue even in ancient India. The concept has been developed further with the development of trade and industry. The aim of the trademark is to identify the source of a product and to distinguish that product from product of similar nature. Trademark individualizes the goods of a

particular owner and helps him to maintain and improve the quality and standard of the product. It also helps consumers to select the right choice. We are living in the era of globalization. As a result of this globalization and liberalization of Indian economy the competition among products and services are increasing day by day.

The term "Mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof. The selection of the graphic representation is an important step for any applicant because the Trademark is defined by the Graphic representation which is filed on or with the application form. "The term "graphical representation" means the representation of a trade mark for goods or services in paper form. The Trademark may be registered or unregistered but registration under the Trademark Act, 1999, does not confer any new right to the mark claimed. It only facilitates to get a remedy in case of infringement of Trademark. Registration itself does not create a trademark. The trademark exists independently of the registration which merely affords further protection under the statute. Infringement of Trademark takes place when a person other than the registered proprietor or registered user, uses the similar mark or a deceptively similar mark with regard to same goods or services for which the mark is registered.⁶

⁵WIPO (1883), "Paris Convention for the Protection of Industrial Property", source: <http://www.wipo.int/treaties/en/ip/paris/>, accessed on April 16, 2016

⁶P. Narayanan, Law of Trademarks and Passing Off (6th edition,).



The infringer uses another's registered mark, or some confusingly similar sign, as a trademark to indicate the source or goods or services. A case of infringement, however, will require proof of likelihood of confusion and likelihood of association. Similarity is an essential ingredient. Because of this similarity likelihood of confusion may exist. Advertisement of the registered Trademark of another for one's own purpose will also amount to Trademark infringement. Again, in respect of an unregistered Trademark, the owner of the Trademark may take action of passing-off against those who pass off his/her goods or services. This remedy is known as common law remedy under the law of Torts. Comparative advertising, if accompanied with disparaging, may cause infringement or passing-off of Trademark. However there are various provisions in the Trademark Act, 1999, which deal with infringement or passing-off of Trademark. Infringement and passing-off of Trademark can also be called as unfair competition.⁷

Comparative advertisements are used to make the products, services or opinions familiar to the people. It is a process of communication between the owner of the products or services and consumers. The consumers become familiar to the effectiveness and utility of the existing products and future products. It helps the consumer in taking right decision and it is an art of communication technique by which the Trademark or brand of the product or service is made known to the people.⁸

Advertising is the act of advertising that specifically compares the advertised brand with another brand of the same product. Comparative advertisement is an advertisement where a party advertises his goods or services by comparing them with goods and services of another party. It is an advertisement in which there is specific mention or presentation of competing brand(s) and a comparison is made or implied. It is a practice of either directly or indirectly naming one or more competitors in an advertising message or usually making a comparison on one or more specific attributes or characteristics. It is a technique which compares two or more brands on the basis of one or more product attributes. So comparative Advertising is a sales promotion technique that compares the products or services of one undertaking with those of another or with those of other competitors. It is aimed at to highlight the advantages of the goods or services offered by the advertiser as compared to those of a competitor.

It can be divided into two types firstly, a positive comparison as a positive reference is made to claim that one's own product is as good as the others and secondly, a negative comparison to claim own product which is better than the other. The positive comparison is also known as indirect comparative advertisement and the negative comparison is also known as direct comparative advertisement. In both of these cases an unauthorized reference to the competitor is made.

⁷Justice P.S. Narayana's Intellectual Property Law in India (3rd Edition-2005);

⁸William Cornish and David Llewellyn, Intellectual Property: patents, copyright, Trademarks and Allied Rights(5th edition);

Comparative advertising should not be misleading or disparaging. Because the advertisement campaign on the visual media has an immediate impact on the viewers and possible purchasers mind. The term “disparage” means to dishonour by comparison. To unjustly discredit or detract from the reputation of product, or business. The term “disparagement” means a false and injurious statement that discredits or detracts from reputation of another’s property, product or business. As per New International Webster’s Comprehensive Dictionary the term ‘disparage’ means to speak of slighting; undervalue or to bring discredit or dishonour upon. And the term “disparagement” means the act of depreciating, aspersing, slighting or undervaluing, derogation, or a reproach; disgrace. As per Oxford English Dictionary the term “disparagement” means lowering of value, honour, or estimation; dishonour, disgrace, indignity, discredit; something that causes this. Comparison should not be made on false or misleading statements about the goods or services. However, there are some advantages and disadvantages of comparative advertising.⁹

Methods of Misleading the Consumer

Service providers often tack on the fees and surcharges that are not disclosed to the customer in the advertised price. Manufacturers disadvantage customers through various methods such as:

- Unfair contract terms, notably with respect to consumer compensation.

- Use customer data for purposes other than they were obtained for.
- Apply unfair fees, charges and penalties on transactions.
- Place artificial restrictions on the time period during which customers can submit claims.

The meaning of "free" is “usually devoid of cost or obligation”. However, retailers often use the word for something which is merely included in the overall price. One common example is a "buy one, get one free" sale. The second item is not "free" under the normal definition, since, to obtain it, the buyer is obliged to pay the full cost of the first item. Until recently and sometime at regular intervals we come across free calls in mobile phone ‘Tariff Plans’ which were very attractive till the consumer realised that in order to get a “free” service of a call or an SMS, very often one call or SMS is required to be made to actually paid for all the so called free ones. Very often there are some hidden fees and surcharges. This is most common inactivation of services such as mobile phones Advertisements of sales that persuades a consumer to buy at a given time to merely push a product as if it is the last piece of the product or service irrespective of the affordability and the real need as opposed to created need. Also when a mobile operator promises STD calls for 40 paise per minute and conveniently omits to say that this rate is applicable only when calls are made to another mobile of the same company, then it constitutes misrepresentation.¹⁰

⁹John W. Crawford, The Permissible Lie: The inside truth about advertising.

¹⁰Kerly’s Law of Trademarks and Trade names (13th edition) by David Kitchin, David Llewellyn, James

Mellor, Richard Meade, Thomas Moody Sturt (London, Sweet and Maxwell-2001);



When any advertisement uses or rather misuse of the word “free” (“buy one, get one free” sale) there it is an established fact that the consumer is very definitely paying for what is apparently free. Additionally even the advertising costs in most cases actually are paid for by the consumer. Similarly for the conscious consumer whenever there is a gift on purchase of a product, it ought to be a genuine gift and not something that equivalent amount for which has already been included while purchasing the product or service.

Any representation that purports to be a warranty or guarantee of a product, or a promise to replace, maintain or repair an article, or any part of an article, where it is materially misleading or where there is no reasonable prospect that the warranty, guarantee or promise will be carried out is another example. In the name of competition, advertising for products and services often take to double ticketing occurs when a seller puts two or more prices on a product or service, and the consumer is not charged the lowest price.¹¹

The audio-visual medium to which the future generation is exposed does acrobats on motorcycles or jump from buildings, carry with them statutory warnings in such fine print that before the young audience has understood the implications the act and its impact might be unimaginable. They also prohibit making performance representations which are not based on adequate and proper tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue, misleading or unauthorised use of tests and testimonials,

bait and switch selling, double ticketing and the sale of a product above its advertised price. Further, the promotional contest provisions prohibit contests that do not disclose required information.

Any promotional contest that does not disclose the number and approximate value of prizes, the area or areas to which they relate and any important information relating to the chances of winning, such as the odds of winning also come within the preview of misleading advertisements.

Telemarketing is one of the most common forms of direct contact advertising used by a wide range of businesses for their advertising and sales. Telemarketing is contact, via a telecommunications service, from an individual or organisation whose aim is to supply, provide, advertise or promote goods and services. This includes contact by landline, mobile, SMS and fax the source and services are difficult to identify and there exists a fair and often chances of being misled. Telemarketing has become a cognisable offence.

One of the most common methods is the manipulation of measurement units and standards despite the fact that there is a specific law against it. This includes the fact it is common experience that fillers and over-sized packaging used both in the advertisement or the product are also examples of such products which are increasing the circumference of toothpaste tube.

There are also untruthful manipulations of terms both in food and cosmetics for example herbal, organic food, light food and etc. The advertising world is flooded with incomplete comparisons for instance

¹¹ 18th Report and Accounts for the year 2003-04, ASCI, p.41.



using the terms "better" or "best", without any basis or meaning this is commonly made to be said by young children in television advertisement which attract both the young and the elder or old audience. Inconsistent Comparison of an item is compared with many others, however only as seen for insurance advertisements compared with companies not having the same attributes and pleading that the viewer call other financial companies and see the difference themselves and implying that others are devils who do not care for the best interest of their clients.

It shows the items to be larger than they really are. False colouring which is used to make people think food is riper, fresher, or otherwise healthier than it really is. Angel dusting an ingredient which would be beneficial, in a reasonable quantity, is instead added in an insignificant quantity which will have no consumer benefit, and make the claim that it contains that ingredient.

To further identify the issue it is necessary to attempt at defining misleading advertisements, its categories, differences such as false advertisements, deceptive advertisements, surrogate advertisements, unethical advertisements and even advertisements that are suggestively indecent in nature. The attempt is to be comprehensive on the issue however it is not a claim to be exhaustive in nature. For lack of established terminology, sometimes examples have been cited for clarity.

In the process of attempting to understand the difference between misleading and deceptive advertisements it is said that those advertisements that affect the economic behaviour of those exposed to it is known as deceptive advertisements. The most common of these are property

advertisement where consumers invest with the hope that a certain investment would assure a certain quality turns out to be a mirage rather than a reality. In that sense one can state that false or deceptive advertisements are more or less the same. False advertising or deceptive advertising is the use of false or misleading statements in advertising. As advertising has the potential to persuade people into commercial transactions that they might otherwise avoid.

To suggest that pomegranate juice is good for health is acceptable however to claim that it prevents cancer is an issue that remains debatable. Advertisers should always be able to justify the validity of any claims they make. Therefore, advertisers should provide evidence of the accuracy of their claims. Similarly, when an edible oil advertisement gives the sense of relief that as long as consumers use it they are free from any heart ailment, it is as deceptive as a water purifier that claims to be 100 percent free of any water borne bacteria, both the examples reiterate the fact that not only is there exaggeration, incorrect assurance these products when bought and put into use is not only incorrect and misleading, the consumer tends to feel protected which is a misnomer. Doubtful advertisements are misleading, deceptive, suggestive, exaggerated and surrogate that we are today surrounded with.

It means taking advantage of consumer psychology and depriving consumers of a choice. For example, a consumer is lured into a retail outlet by an advertisement for a low cost item and then is sold a higher priced version or to be defective. Once the consumer enters the store, he or she is pressured to purchase another more expensive item. On visiting such stores, one

finds a handful of outdated products on the discount announced and other better products as fresh stock.

Exaggeration and Puffery is use of harmless superlatives. The advertisers use them to boast of the merits of their products (best, finest, excellent, number one, etc.). Even law permits trade puffing or exaggeration. Subjective statements of opinion about a product's quality are so untrue that it becomes an outright spoof and which is not true. In 1997, Monopolies & Restrictive Trade Practices (MRTP) Commission asked Hindustan Lever Company to stop its campaign that certain toothpaste was 102 percent better than the Colgate toothpaste. Hindustan Lever was restrained from "referring to any other Toothpaste in any manner, either directly or indirectly, by means of any allusion or hint in its TV commercials or newspaper advertisements or hoardings, by comparison of its New Toothpaste with any other product in general, and a certain dental cream in particular.

- Existing Mechanisms and Laws dealing with Misleading Advertisements

1- Key Laws related to Misleading Advertisements

There are various provisions of law to prevent and punish offenders. These laws can be divided into three categories such as

A. Laws having vertical application on advertising

- Prize Competition Act, 1955
- Transplantation of Human Organs Act, 1994
- Drugs and Cosmetics Act, 1940
- The Young Persons (Harmful Publications) Act, 1956
- Drugs and

Magic Remedies (Objectionable Advertisements) Act, 1954

- Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- Prevention of Food Adulteration Act, 1954/ Food Safety and Standards Act, 2005
- Prize Chits and Money Circulation Schemes (Banning) Act, 1978
- The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 and Amendment Act, 2002

B. Laws having horizontal application on advertising

Indecent Representation of Women (Prohibition) Act, 1986

- The Consumer Protection Act, 1986
- Cable Television Networks (Regulation) Act, 1995
- Monopolies and Restrictive Trade Practices Act, 1969
- The Emblems and Names (Prevention of Improper Use) Act, 1950
- Trade and Merchandise Marks Act, 1958.

C. The following Regulatory authorities have the power to regulate advertising in their respective domains.

- Reserve Bank of India
- Medical Council of India
- Securities and Exchange Board of India
- Insurance Regulatory Development Authority
- Telecom Regulatory Authority of India

2- The Consumer Protection Act, 1986

The Constitution of India, which is divided into different parts. Part III deals with Fundamental Rights and Part IV deals



with Directive Principles of State Policy. These two parts denote two important features of our constitution. The former denotes the existing and enforceable legal rights and the latter denotes the targeted social and economic goals which our founding fathers desired, our successive governments to achieve.¹² In pursuance of achieving one such goal, Consumer Protection Act (COPRA) came into force in the year 1986. That as per the preamble of the Act it was brought to provide for the better protection of the interests of consumers and for settlement of consumers' disputes. Although there were remedies in other laws like Contract Act, Sales of Goods Act, Torts, IPC and procedure prescribed in C.P.C. and Cr.P.C. The purpose of enactment of COPRA, 1986 was to provide specialised redressal to the consumer grievances; it protects the interests of consumers in India. The three tier-quasi-judicial mechanisms at the district, state and national level is the backbone of COPRA for providing simple, speedy and inexpensive redressal of the disputes of the common consumers and having strong provisions to deal with misleading advertisements. To fulfil the objects of the Act the Central Government has established the Central Consumer Protection Council, and the State governments have established the District forums and the State Consumer Protection Councils in their respective states. A complaint may be made by either the consumer, the government, a recognised consumer society or by one or more

consumers having a common interest, within two years of the arising of grievance, as a result of unfair trade practice by complaint in few cases some losses may cause to a consumer, defect in goods, deficiency in services, charging in excess of price displayed etc.

Once the complaint has been received the other party will be asked to give their version of the case. If the matter pertains to defective goods, the same may be sent to a laboratory for testing. If it relates to a service matter then both parties shall be asked to produce evidence in support of their claims. If the authority is convinced that the complaint is valid then it may order the producer to remove the defect, replace the goods, return the price paid by the consumer, or pay an amount to the consumer as compensation for any loss or injury suffered. An appeal may be made against such orders to the next highest authority if a trader or any person against whom an order has been made, fails to comply with the order then they may be fined or imprisoned. On the other hand if a complaint is found to be frivolous or malicious then the complainant may be fined.

In fact under Commissions and procedures of the Act, any consumer can appear before the commission and need not even hire a lawyer to argue one's case. Despite the simple procedures there have not been too many consumer cases in India unlike the U.S where the courts are filled with consumer grievances.¹³ And the next is lack

¹² The Consumer Protection Act, 1986, source: http://www.ncdrn.nic.in/1_1.html, accessed on April 14, 2016

¹³ http://www.cci.gov.in/images/media/Advocacy/Awareness/speech_member.pdf?phpMyAdmin=NM PFRahGKYeum5F74Pp stn7Rf00, accessed on April 14, 2016



of adequate consumer awareness of their rights in India and the seemingly intimidating structure of courts and the legal profession. However, to its credit, it must be said that the COPRA remains one of those rare laws which allows for a speedy and simple protection of the rights of ordinary people, and judicious use of the same would foster a greater consumer movement in India in this age where the market is flooded with more products but not necessarily more information.¹⁴

Section 2 (r) of the COPRA 1986 gives a comprehensive definition of Unfair Trade Practices (UTPs) and section 14 deals with the directions that the court can give to deal with such practices. The consumer fora can issue interim orders stopping such advertisements pending disposal of the case. They can give directions to the advertiser to discontinue such advertisements and not to repeat it and can award compensation for any loss or suffering caused on account of such false advertising. They can also award punitive damages and costs of litigation. Most important, they can direct the advertiser to issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.

The consumer fora can only adjudicate over complaints filed before them. The consumer courts neither have the power nor the infrastructure to investigate like earlier MRTP Commission, suo motto into

misleading advertisement nor take up such cases on their own. Nor do they have an investigative wing. Inordinate delays in pronouncing the final verdict. There is no clarity about the jurisdiction of consumer fora in case of misleading advertisements. If someone complains against any such advertisement who have not had actual loss, so which fora he should complain?

3-Food Safety and Standards Act 2006¹⁵¹⁶

Food Safety and Standards Act 2006 is enacted to keep with changing requirements of time and to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India (FSSAI). The Act was needed to bring out a single statutory body for food laws, standards setting and enforcement so that there is one agency to deal and no confusion in the minds of consumers, traders, manufacturers and investors which was due to multiplicity of food laws. Food Safety and Standards Authority of India, established on September 05, 2008 in association with State Food Authorities are responsible for implementation & enforcement of FSSA, 2006.¹⁷

The main mandate assigned to the Food Authority is to lay down science based standards for articles of food and to regulate manufacture, storage, distribution, sale and import of food; and also to facilitate food safety. It seeks to regulate the law relating to advertising and unfair trade practices in the food sector.

¹⁴Report of High Level Committee on Competition Policy, 2000, source:

<http://ebookbrowse.com/gdoc.php?id=115899518&url=4a6c2f5ebd6e8ca816bdb382dd05a63e>, accessed on April 14, 2016

¹⁵ <http://www.fssai.gov.in/portals/0/pdf/food-act.pdf>, accessed on April 14, 2016

¹⁶ <http://www.delhi.gov.in/wps/wcm/connect/53b19a804de04e538d00cd6c28b72f2a/Rajeev+Kapoor+05+Nov..PDF?MOD=AJPERES&lmod=-299699964>, accessed on April 17, 2016

¹⁷

Section 24 of the Act places restrictions of advertisement and prohibits UTPs. It lays down the general principles for advertisement. Section 52 and 53 of the Act prescribe the punishment for selling misbranded food and also for misleading advertisements. Section (53) prescribes that any person who publishes, or is a party to the publication of an advertisement, which falsely describes any food or is likely to mislead as to the nature or substance or quality of any food or gives false guarantee shall be liable to a penalty which may extend to ten lakh rupees.¹⁸

4-The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

This Act was basically brought into existence to control the advertisement of drugs in certain cases and also prohibits the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The Act prohibits any medical practitioner to be involved in advertising for any medical product whether in print or through the audio-visual medium prohibition of misleading advertisements relating to drugs. However, according to the provisions of this Act, no medical person shall take any part in the publication of any advertisement relating to a drug if the advertisement contains any matter which directly or indirectly gives a false impression regarding the true character of the drug, or makes a false claim for the drug, or is otherwise false or misleading in any material particular. No person carrying on or purporting to carry on the profession

of administering magic remedies shall have committed an offence under this Act.

“The Delhi High Court on May 16, 2012 issued notice to the central and Delhi governments on plea seeking action against a self-styled baba who advertises offering magic treatment to patients. The petitioner alleged that Nirmal Baba had been advertising in different electronic and print media claiming to offer magical treatment while claiming to be a representative of God. The petitioner sought a ban on all advertisements by the baba, saying that such publicity was contrary to the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. The common man is being misled by the self-styled Nirmal Baba under the belief that the problems of a particular person will be solved with his blessings.”¹⁹

Magical remedies for diseases has known to have cost the lives of many persons who have been sold the idea of being “No Risk” remedies when actually it involves risks and safety and are prohibited by law. The fact that products and advertisements are studied and targeted with market research and addresses and creates needs often when there are no real ones. Children, their health and well-being are targeted in a manner that mothers often stretch their family budget depriving themselves of essentials.

5-Advertising Standards Council of India (ASCI)

Advertising Standards Council of India (ASCI) is a self-regulatory voluntary organisation of the advertising industry. The role and functioning of the ASCI in

¹⁸ <http://www.fssai.gov.in/Portals/0/Pdf/FAQ.pdf>, accessed on April 17, 2016

¹⁹ Media Consumption, IRS, Q1, 2012



dealing with complaints received from consumers and industry, against advertisements which are considered as false, misleading, indecent, illegal, leading to unsafe practices, or unfair to competition, and consequently in contravention of the ASCI Code for Self-Regulation in Advertising. If a consumer or even the industry, feels that an advertisement contravenes the code, a complaint can be sent to ASCI. In fact, ASCI's advertisements exhort consumers to complain, whenever they come across advertisements which they think is false or misleading or unethical.

ASCI, established in 1985, was formed with the support of all four sectors connected with Advertising, viz. Advertisers, Ad Agencies, Media (including Broadcasters and the Press) and others like PR Agencies, Market Research Companies etc. Its main objective is to promote responsible advertising thus enhancing the public's confidence in Advertising. Except ASCI, there is no other non-governmental body in India which regulates the advertising content that is released in India.²⁰

When an advertiser is creating an ad, the consumer is his audience. The feedback from a consumer is important to the advertiser so he can be assured if his message has been correctly conveyed. If a consumer feels that a particular advertisement is in bad taste or is false in its claims, they need a body or council to whom they can air their grievances and who will take any appropriate action, if necessary. ASCI as a self-regulatory body governing advertising content is the ideal

medium as its purpose is to serve both the advertisers as well as the consumers. ASCI code for Self-Regulation is mainly to ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements. In addition the code is to ensure that advertisements are not offensive to generally accepted standards of public decency. "In September 2012, Consumer Complaints Council (CCC) of the Advertising Standards Council of India (ASCI) upheld complaints made against 15 out of 22 advertisements. During the same period, it did not uphold complaints against 7 ads. The effective functioning of ASCI's National Advertising Monitoring Service (NAMS) continues to help track down misleading advertisements that were otherwise missed as consumers did not lodge complaints to ASCI against them."²¹

Advertising self-regulation does not replace statutory legislation but Comparative advertising explicitly or by implication makes reference to a competitor or competing goods or services. This type of advertising is only permitted when it is not misleading. It can be a legitimate means of informing consumers of what is in their interests. An existing framework of law to provide robust and proportionate consumer protection with advantages for consumers, business and governments though self-regulation is laudable but existing time lag between a claim not supported by facts and corrective measures are wide and hence unacceptable. Besides, membership of ASCI is not compulsory and hence representation on ASCI from the advertiser's category

²⁰ <http://www.ascionline.org/>, accessed on April 15, 2016

²¹ www.bestmediainfo.com/2012/12/asci-pulls-up-15-misleading-ads-in-september-2012/

continues to be poor, all major advertisers are not yet members of ASCI.

Conclusion

As a matter of fact, advertising creates employment opportunities, provides information regarding the developments taking place in the society, contributes to economic growth, and provides information about products and services available in the market which helps in taking buying decisions. Therefore advertising is essentially a part of the service industry that involves communication of information and ideas to and on behalf of others. According to my studying, it can be said that multiple laws pertaining to advertisement in general and those relating to specific sectors cause utter confusion in the minds of the manufacturer or service provider as well as the consumers. Therefore a comprehensive law or regulation on advertising in all forms of which shall provide clarity in the matter and act as a one-stop window for all matters relating to advertising is highly needed.

Regarding to the comparative advertisement it is worth mentioning that it should stay if accompanied with true facts. It can be helping the market to be competitive and helps the consumers to decide between two products or services. Nowadays the Nature of market, trade and commerce has completely been changed in the era of globalization. Consumers are badly in need of more and more information about a particular product or service in order to make their choice and decision accurate and correct. Here is the importance and efficiency of comparative advertisement. On the other hand, comparative advertisement has many disadvantages and should not be allowed if

it is accompanied with false information about the products and services and intends to discredit, denigrate or disparage the products or services of rival competitors.

In their legal context, the existing legal provisions in India are not strong enough to prevent the evils of disparagement in comparative advertising. India is heading to achieve the status of one of the powerful economic giant of the world. Various foreign companies including Multinational companies (MNC'S) are coming to establish business here. This has prompted the rapid increase in the war of advertisement among various brand owners. It is the need of the hour to strengthen the existing legal provisions and to introduce a new provision in the existing Acts to restrict and check commercial disparaging in comparative advertising. Otherwise Indian courts will be flooded with these type of cases. However, in doing that balancing of interest must be made judiciously. That is the interest of advertisers in promoting their products and the interest of rival competitors who are supposed to suffer a loss from that advertisement. The interest of the public in getting accurate and fair information is also to be protected. Furthermore, more stringent punishment should also be incorporated in the existing legislations to prevent disparaging in comparative advertisement. The companies or advertisers should advertise with a view to inform the consumer and not to attack, criticize, discredit or disparage other products and services directly or indirectly. Moreover, the comparative advertisement should be informative and should reflect positive merits of the products or services. Furthermore, more effort should be done to strengthen the institutional set-up already in



place by amending the existing institutional set-up and to order reasonable penalties other than just compensation and more Co-ordination between the consumer law and other law sectors through different mechanisms from developed countries. And Membership of ASCI must be compulsory to all major advertisers.